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No. 78-1761

MICHAEL HODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ORRIS BALLARD, ET AL.,

Petitioners,

vs.

PEOPLE OF THE STATE OF
ILLINOIS,*Respondent.*BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

CASES

- Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457 (1942)
- Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173 (1978)
- Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170 (1978)
- State v. Kesterson*, 403 S.W.2d 606 (Missouri Supreme Court 1966)
- United States v. Haldeman*, 559 F.2d 31, cert. denied
Ehrlichman v. United States, 431 U.S. 933, 97 S.Ct. 2641 (U.S. App. D.C., 1976)
- United States v. Hollinger*, 533 F.2d 535 (7th Cir. 1977)
- United States v. Roy*, 574 F.2d 386, cert. denied 99 S. Ct. 172 (7th Cir. 1978)

ARTICLES

- Hyman, Steven "Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache" 5 Hofstra Law Review 315 (1977)
- "The Sixth Amendment and The Right to Separate Counsel" Case Comment, 16 Houston Law Review 209 (1978)
- "Holloway v. Arkansas: A Partial Solution To the Problems Inherent In the Multiple Representation of Criminal Defendants" Case Comment 45 Brooklyn Law Review 191 (1978)

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OPINION BELOW

Pursuant to Supreme Court Rules 23(1)(b), 24(1) and 40(3), the respondent objects to the statement of the Opinion Below contained in the petition for writ of certiorari. The opinion of the Illinois Appellate Court attached as Appendix A is inadequate on two bases. The opinion is characterized as a split decision with a one judge dissent (Petition at 2) when in fact it was an opinion affirming the judgment of the trial court prepared by Justice Woodard with Justices Seidenfeld and Rechenmacher concurring. *People v. Ballard, et al.*, 382 N.E.2d 800 at 802, 810. A more serious objection to the opinion as submitted by the petitioners is the absence of four paragraphs that the respondent considers vital to this Court's proper review. The missing part of the opinion is incorporated in Part I of this opposition brief.

STATEMENT OF JURISDICTION

The respondent objects to the Statement of Jurisdiction as submitted by petitioners. Four persons, the original co-defendants, are identified as petitioners in the instant cause of action. (Petition at title page) However, the record is clear that co-defendant Donald Russell was not a party to the Illinois Appellate Court proceeding, 382 N.E.2d 800, 802, thus petitioner Russell cannot invoke the jurisdiction of this Court. (Supreme Court Rule 23(1)(f)). It should also be noted that since no allegations were made in the appellate proceeding nor in the instant petition regarding possible prejudice suffered by petitioner Lawrence Ballard by reason of the joint representation of two of his co-defendants, petitioner Ballard cannot properly request this Court to review a claim of ineffective counsel. Supreme Court Rule 23(1)(f).

INTRODUCTION

The petition for writ of certiorari is based on events alleged to be violative of sixth amendment right to counsel and fifth and fourteenth amendment due process constitutional protections. The respondent respectfully requests this Court to deny the petition for the following reasons. The respondent contends that the arguments raised do not relate to the facts of this case and thus constitute a request for the adoption of a per se rule prohibiting joint representation of co-defendants in criminal litigation. Secondly, the argument related to sufficiency of the indictments is characterized by petitioners as "admittedly a narrow point" (Petition at 4). Since the sole authority offered in support of the second question is an alleged inconsistency between a 1966 Missouri Supreme Court decision and the 1978 Illinois Appellate Court decision, the respondent judges this a nugatory issue not deserving of examination by this Court. Furthermore, the respondent will prove that the decision below is not only a correct judgment on the particular facts but that it is entirely consistent with previous judicial determinations.

I.

THE COURT BELOW CORRECTLY DETERMINED THAT THE TRIAL JUDGE COMPLIED WITH *HOLLOWAY* v. *ARKANSAS* STANDARDS REGARDING THE DETERMINATION OF EFFECTIVE ASSISTANCE OF COUNSEL.

The major argument advanced by petitioners is the conclusion that the actions of the trial judge resulted in a denial of the right to effective counsel contrary to the mandates of this Court in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). The *Holloway* decision reaffirmed the principle of recognition of the possible appropriateness of joint representation of multiple defendants, *Id* at 482, but held that a timely notice by defense

counsel claiming the existence of conflict of interests triggers a duty on the part of the judge "to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel". *Id* at 484. The Court continued: "[W]hen an untimely motion for separate counsel is made for dilatory purposes, our holding does not impair the trial court's ability to deal with counsel who resort to such tactics. (citations omitted) Nor, does our holding preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client." (citations omitted) *Holloway* at 486.

The respondent maintains that the record below provides adequate evidence that the trial court had reason to inquire into the possibility of dilatory motivation related to the defense counsel's petition to withdraw and further that the record demonstrates adequate provision was made by the trial judge for continued examination of claims of conflict of interest arising during the litigation.

In support of this argument and as additional evidence of the concern demonstrated by the trial judge regarding the rights of the defendants, it is imperative that this Court have access to the omitted parts of the opinion. This material found in the record at 382 N.E.2d 808 contains a responsive statement by the defense counsel regarding a motion to sever that clearly indicates a defense strategy based on a theory of common defense totally inconsistent with subsequently raised claims of conflict of interest. The omitted excerpt also includes the essence of the Appellate Court's analysis of claims of antagonistic defenses as well as its examination of the trial court's procedural determinations. The excerpt is as follows:

"Your Honor, I would point out for the record that my clients do not care if the case is tried separately or together with Mr. Russell. They feel that they have done nothing wrong and I don't think that it matters to them."

Again during opening statements the defense advances the theme that AITC was a legitimate enterprise and the defendants' efforts to promote it were honest and substantial. Defendants admit that the "blame theory" was never urged at trial. Therefore the antagonistic defenses claim is without merit.

However, defendants have further argued that even where antagonistic defenses are not present, defendants still have a right to a separate trial where a joint trial would be highly prejudicial to any of them. They maintain that the joint trial was highly prejudicial to them due to the introduction of other transactions admitted to prove intent, some of which did not involve all defendants. Prior to trial, the state indicated to the trial court that this evidence linked three of the defendants to other companies. The trial court was of the opinion that if the introduction of this evidence resulted in prejudice to any of the defendants, a mistrial would be declared as to those defendants. When the testimony was introduced, the trial court struck the testimony as to those defendants it did not relate to and admonished the jury to disregard it as to those defendants. Where the only ground for severance is that part of the testimony competent against one is incompetent against the other, there is no abuse of discretion in refusing a separate trial. (*People v. Mutter*, (1941) 378 Ill. 216, 37 N.E.2d 790.) Therefore we conclude that no error was committed in denying a severance to defendants.

Defendants have also objected to the evidence of transactions involving other companies on the grounds that they were not similar to the transactions alleged in the indictment. Evidence which proves a fact in issue is admissible though it may evidence that the accused has committed another separate crime. *People v. McDonald*, (1975), 62 Ill.2d 448, 343 N.E.2d 489.

People v. Ballard, et al., 382 N.E.2d 800 at 808.

The respondent contends that the *Holloway* requirements were fully complied with by the action of the trial judge. This is apparent after an examination of the facts surrounding the

motions to withdraw representation and the judge's response to those requests.

In the instant case the trial judge ascertained that the defense counsel has been retained by two of the four co-defendants five months before trial. 382 N.E.2d 807, (Petition at 3). The attorney filed a motion to withdraw representation one week before the trial. This motion was argued and denied on the day the trial began. The record indicates that on one additional occasion during the two week trial, the defense attorney "again alluded to a 'possible' conflict that 'could' arise. The trial court indicated that if the conflict did arise the attorney should again consult with the trial court." 382 N.E.2d 807. Based on these facts in combination with the statement by the attorney of a deliberate strategic decision to pursue a common defense not only between his defendants but in conjunction with the other two co-defendants, the Appellate Court concluded that the trial judge had comported with the directives mandated by *Holloway*. *Ballard* at 807. The untimely motion to withdraw followed by the speculative nature of the retained counsel's fears of conflict; the interrogation of counsel combined with the judge's assurance of his willingness to continue to evaluate claims of conflict, all give evidence of full compliance with *Holloway* requirements. Thus, the decision below is correctly predicated on the facts, is based on a proper application of *Holloway* standards and does not warrant review by this Court.

II.

THE PETITIONERS HAVE FAILED TO ADVANCE REASONS NECESSITATING THE RE-EVALUATION OF THIS COURT'S REJECTION OF A PER SE RULE PROHIBITING JOINT REPRESENTATION IN *HOLLOWAY V. ARKANSAS* AND *GLASSER V. UNITED STATES*.

An "important yet unanswered question, namely whether the tardy nature of the motion to withdraw will defeat a

defendant's right to effective assistance of counsel" is raised by the petitioners (Petition 3). The respondent argues, that although suggestive of a significant legal issue, this question would have been inappropriately directed to the court below. For such a question is in reality a request for a re-evaluation of this Court's rejection of a per se rule prohibiting joint representation announced in *Glasser v. United States*, 315 U.S. 60, (1942) and affirmed most recently in *Holloway v. Arkansas*, 435 U.S. 475, (1978).

Conceivably, there exist three reasons why a joint representation case would merit review. The Court may wish to evaluate judicial responsiveness to its *Holloway* directives. The two undecided issues in *Holloway* 435 at 482, the degree of notice and certainty of alleged conflicts and the nature and scope of the affirmative duties incumbent on trial judges may be ripe for resolution. Finally, the Court may consider it necessary to once again measure the benefits derived from an absolute bar to joint representation. However, review of the instant case would provide an extremely limited forum for analysis of any of these issues.

Arguments in favor of a rule prohibiting joint representation are systematically raised in various commentaries published prior to and immediately following the *Holloway* decision. Hyman, "Joint Representation of Multiple Defendants In A Criminal Trial: The Court's Headache", 5 Hofstra Law Review 316 (1977); "The Sixth Amendment and the Right to Separate Counsel" Case Comment, 16 Houston Law Review 209 (1978); "*Holloway v. Arkansas: A Partial Solution To The Problems Inherent In the Multiple Representation of Criminal Defendant*" Case Comment, 45 Brooklyn Law Review 191 (1978). Among the issues raised are avoidance of danger to client confidentiality precipitated by a judicial inquiry into existence of co-client conflicts, elimination of actual conflicting interests arising in areas such as admissibility of evidence, right to testify, plea bargaining efforts, sentence reduction strategies,

effect on judicial economy and unavailability of the utilization of a common defense. There will certainly be future opportunities for the Court's review of one or more of these important issues, but an examination of the facts in the instant case gives evidence of its inappropriateness as a vehicle for review purposes.

If this Court chooses to evaluate judicial performance related to the *Holloway* right to counsel standards it would seem advisable to choose a case tried after April 3, 1978. Interpretation of the standards is more fitting in a case occurring after the promulgation of such standards, which is not true of the present case. The present case also involves co-defendants who were in fact represented by separate counsel unlike *Holloway*. This factor would contribute to the difficulty of determining possible harm to the defendants who had retained the same attorney.

If, on the other hand, this Court wishes to return to the unresolved questions of *Holloway*, the instant case does not offer a sound basis for analysis. The trial judge's willingness to remain responsive to alleged claims of conflict of interest precludes the type of examination that would be possible if there were definitive judicial behavior. The absence of finality in the court's response to counsel's request minimizes the opportunity for analysis.

The motivation to re-examine the rejection of a per se joint representation rule is also marginal due to the facts of the crime and the nature of the defense. Since the theory of a common defense related to lack of business acumen, with the defendants characterizing themselves as victims of a general recession, the utilization of such a joint defense, if not persuasive, appears suitable in a financial crimes prosecution. Differences over plea bargaining opportunities, antagonistic testimony, objections to the introduction of evidence were not of major import here, again, distinguishable from *Holloway*.

Therefore, although recognizing the significance and legitimacy of the question being raised, the respondent urges the Court to withhold review and submits that the petitioners' failure to raise arguments in support of review obviates the necessity warranting such review.

III.

THE HOLDING BELOW VALIDATING THE CONSTITUTIONAL AND STATUTORY SUFFICIENCY OF THE CRIMINAL INDICTMENTS IS CONSISTENT WITH PREVIOUS DECISIONS OF BOTH FEDERAL AND STATE COURTS.

The petitioners argue that the indictments used in their criminal prosecution were insufficient and consequently resulted in a deprivation of due process protection. The respondent contends that the decision of the court below upholding the validity of the indictments is correct, consistent with recognized legal principles and that the solitary judicial determination offered by petitioners to support a claim of conflict is distinguishable both on its facts and in regard to its application of law.

There are three essential elements required for determining the sufficiency of a criminal indictment; that it properly notify the defendant of the nature of the charged offense *United States v. Haldeman*, 559 F.2d 31, 181 U.S. App. D.C. 254, cert. denied *Ehrlichman v. United States*, 431 U.S. 933, *Mitchell v. United States*, 431 U.S. 933, that the indictment set forth the elements of the offense in order that the defendant can prepare for trial, *United States v. Roy*, 574 F.2d 386, *United States v. Hollinger*, 553 F.2d 535; and that the statement of the offense charged is such that it enables the defendant to avoid the consequences of

double jeopardy. *Sanabria v. United States*, 437 U.S. 54, (1978). That the reviewing court evaluated the indictments on each of these basis is certainly evident. After listing similar criteria the court concluded:

Applying this reasoning to the case before us, the indictment here is phrased in the language of the statute which sets forth all the elements necessary to constitute the offense intended to be punished. The word "theft" is a word commonly understood; moreover the indictment particularizes the charges as theft by deception. The indictment also sets forth the names of the persons whose property was taken as well as the approximate date when the thefts occurred. Moreover, a motion of a bill of particulars was available to defendants; while defendant Russell's motion for such a bill was denied no request for one by the remaining defendants, represented by other counsel, was ever made. As a practical matter, the record demonstrates no difficulty in preparing and presenting a defense and clearly the indictment is sufficient to support a plea of double jeopardy should the need arise.

People v. Ballard at 804.

The petitioners avoid this evidence and cite instead one case which allegedly substantiates a claim of conflict of decisions, *State v. Kesterson*, 403 S.W.2d 606. To claim that the result in *Kesterson* is contrary to the result in the instant case requires an impermissibly narrow reading of the case for it is easily distinguishable. *Kesterson* involved a series of ten separate transfer of monies between the victim and the defendant, not all of which were determined to be part of the overall deceptive scheme. The fact that not all of the transfers were included in the amount of theft charged in the information contributed to the court's determination of insufficiency. More importantly, the decision in the case clearly rested on two separate bases, one of which has no application to the instant case. The *Kesterson* court concluded that the information was insufficient because of the use of generic terms leading to lack of

clarity regarding specificity of the crime charged, but also that the information was fatally deficient because it lacked an essential statutory element, a statement of the victim's reliance upon the alleged deceitful act.

We hold that § 650.156, in describing the offense of theft by deceit, does use generic terms and that it is necessary that indictments or informations thereunder recite sufficiently the conduct constituting a theft by deceit with which a defendant is charged as to notify him as to the charge against which he must defend himself and likewise be sufficient to bar further prosecution for the same offense. We also hold that the information must charge that the victim relied on the misrepresentations with which defendant is charged. *Id* at 611 The information herein did neither.

Thus, the *Kesterson* case does not constitute a diametrically opposed decision and does not conflict with the opinion of the court below.

CONCLUSION

An examination of the entire record reveals the reasons for unanimity in the court of review's affirmation of the conviction. It is evident that the *Holloway* standards regarding judicial duties triggered by a defense counsel's notification of possible conflict of interest were fully complied with by the trial judge. The petitioners' allegation claiming a conflict in state court decisions evaporates upon a close examination of the sole supporting authority, a decision which is readily distinguishable. Finally, although a debatable question is raised regarding the need for an absolute prohibition against joint representation of criminal defendants, the petitioners have not advanced either a factual basis nor persuasive arguments justifying review of this issue. For the foregoing reasons, respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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